

correspondence (App. 3b and 3c) and dealings with the petitioners asserted the then present workmanlike construction of their new homes, inducing them to execute a contract and to make a final purchase, these were a representation as to the **present** quality and character of their work "and is clearly a representation of facts and not a promise as to something to be done in the future....Whether a [house] is in the condition represented is factual, not promissory." *Packard Norfolk, Inc. v. Miller*, 95 S.E.2d 207, 211(1956). *Accord Blair Const., Inc. v. Weatherford*, 485 S.E.2d 137, 139(1997); *Mortarino, supra*.

B&E's representations to the petitioners about the present quality and character of their workmanship were specific representations of the present quality and character of the new house and were therefore actionable under Virginia law either for fraud, *Lloyd v. Smith*, 142 S.E.2d 363, 365 (1928), or for constructive fraud, *Tate v. Colony House Builders*, 508 S.E.2d 597, 599-601 (1999). Contrast *Kuczmanski v. Gill*, 302 S.E.2d 48, 50(1983).

Having alleged that B&E fraudulently induced them into entering the contract and the final purchase of their home, the petitioners were not barred under Virginia law by the doctrine of merger from proving their case since "[w]hen fraud in the procurement of the written contract is pleaded, parol evidence tending to prove fraud is admissible," *George Rohberecht Seafood v. Maitland Bros.*, 255 S.E.2d 682, 683(1979) quoting *Stevens v. Clintwood Drug Co.*, 154 S.E. 515, 518(1930), and the fact that such a party plans to rely upon such evidence "would not render the [pleading] demurrable." *Id.* quoting *Larchmont Properties v. Cooperman*, 80 S.E.2d 733, 738(1954). *Accord Miller v. Reynolds*, 223 S.E.2d 883, 885(1976). Thus, Virginia law uniformly recognizes that fraud destroys all consent, vitiates each contract it touches and does not prevent the petitioners from proving now their allegations that B&E fraudulently induced them to enter into this contract.

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***The Consumer Protection Act.*** The Virginia Consumer Protection Act (VCPA), Virginia Code Sections 59.1-196 *et seq.*, is remedial legislation aimed at promoting fair and ethical standards for suppliers when dealing with the consuming public. *Wilkins v. Peninsula Motor Cars, Inc.*, 587 S.E.2d 581, 584(2003). It evinces Virginia’s strong public policy interest in protecting its consumer citizenry from fraud in the marketplace. The VCPA makes it unlawful for any supplier in connection with a consumer transaction to commit the “fraudulent acts or practices...[of] using any deception, fraud, false pretense, false promise, or misrepresentation...”

Fraud under VCPA need not be pled with the same kind of particularity as common law fraud. *Nigh v. Koons Buick Pontiac GMC, Inc.*, 143 F. Supp. 535, 553-554(E.D. Va. 2001)(applying Virginia law), *aff’d* 319 F.3d 119(4th Cir. 2003), and the petitioners’ allegations were sufficient to meet its standard. *Id.* There is no exemption in the VCPA for fraud committed in the sale of new homes; and under its provisions, B&E fraud together with its failure to install a Radon mitigation system and then affirmatively conceal this fact from the petitioners is actionable because “concealment,

whether accomplished by word or conduct, may be the equivalent of a false representation" under the VCPA. *Lambert v. Downtown Garage, Inc.*, 553 S.E.2d 714, 717-718(2001) quoting *Spence v. Griffin*, 372 S.E.2d 595, 599(1988).

Thus, Virginia law uniformly recognizes that the VCPA encompasses precisely the kind of fraud/misrepresentation by B&E which the petitioners have alleged here. The Virginia courts' inexplicable and unexpected failure to acknowledge this fact denied the petitioners—indeed, all those similarly situated consumers—the remedies provided by the VCPA and is a denial of due process of law.

### PRAYER

The petitioners' plea the Supreme Court of the United States to hear this case is in the public interest so that entities who conduct similar business with consumers will be deterred from this conduct. Entities would not repeat the same negligence and commit false promises, falsely advertise and fraudulently and intentionally misrepresent their product. This also allows the petitioners and others in similar circumstances to be protected under the above laws and to relieve from their financial burdens and receive their justice and constitutional and civil rights as the citizens of the United States; The petitioners have persisted in this case for these reasons.

For all of these reasons identified herein, this Court should grant this Petition for Rehearing and then issue a writ of certiorari to the Supreme Court of Virginia in order to review its decision and redress the denial of petitioners' due process rights or provide the petitioners with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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**CERTIFICATION**

We, Stephen V. Craig and Un Sun H. Craig, petitioners herein, declare under the penalties of perjury that this Petition for Rehearing is made in good faith and is not filed for any purposes of delay.

Signed this 20<sup>th</sup> day of March, 2006, at Springfield, Virginia.

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Steven V. Craig

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Un Sun Craig

March 20, 2006